No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. Ross, Sheriff of Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

BRIEF FOR APPELLEE.

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Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

Appellee filed a petition for a writ of habeas corpus in the District Court of the United States, Southern District of California, Central Division, on November 21, 1949, seeking his release from the custody of appellant, the sheriff of Santa Barbara County, California [R. 2-9]. On May 2. 1950, after the filing of an opinion, findings of fact, and conclusions of law, the District Court entered judgment for appellee, ordering his unconditional release and the discharge of the writ of habeas corpus [R. 93-94].

This Court has jurisdiction of this appeal from the District Court's judgment under Sections 1291 and 2253 of Title 28 of the United States Code.

Statement of the Case.

Pleadings.

Petition. The appellee Middlebrooks' petition for a writ of habeas corpus alleged that he was held in custody by the State of California by virtue of a warrant of extradition issued by the Governor of California based on a demand for extradition by the State of Georgia [R. 2-3]. The demand was in turn based on Middlebrooks' conviction and sentence in Georgia. The petition alleged that California's detention of Middlebrooks for extradiction was unconstitutional because the conviction on which it was based and which it would enforce had been rendered in violation of the due process of law guaranteed by the Fourteenth Amendment, and because the sentence to which the extradition would again subject Middlebrooks was likewise unconstitutional [R. 3, 4, 7].

In support of these assertions the petition alleged that Middlebrooks had been convicted for the alleged offense of burglary and sentenced to five years in jail, without being given a copy of the charges against him; without any trial whatsoever although he had not pleaded guilty; and without counsel despite his request for a lawyer [R. 3-4]. As to the unconstitutionality of the sentence, the petition alleged that Middlebrooks' sentence inevitably entailed in its performance service in the chain gang under brutal and inhuman conditions, including the constant use of shackles, torture devices as punishment for deficiencies in work, frequent whippings, and a complete lack of sanitation in living quarters [R. 5-6]; service of his sentence under these conditions constituted an imposition of cruel and unusual punishment in violation of the guaranties of the Fourteenth Amendment [R. 4]. The petition also

alleged in detail the pursuit of all the remedies furnished by the State Courts of California to secure relief from California's unconstitutional custody [R. 8].

Return. The return alleged that Middlebrooks was held in custody by virtue of the warrant for extradition of the Governor of California, which was based on a demand by the Governor of Georgia and a copy of the indictment and conviction of Middlebrooks received by the Governor of California from the Governor of Georgia [R. 12-13]. The return by implication admitted the truth of the allegations with respect to Middlebrooks' petitions for habeas corpus to the California State Courts, but alleged a lack of information sufficient to answer the remaining allegations, and contended that the petition failed to state a cause of action [R. 13].

Traverse. It was stipulated and ordered that the petition be also treated as a traverse to the return.

Appearance for State of Georgia. The Attorney General of the State of Georgia, though not appearing personally, was permitted to file a brief as *amicus curiae* herein [R. 41].

Facts.

On the basis of testimony elicited at a hearing, and of exhibits submitted by both parties, the District Court made the following findings of fact, none of which has been challenged by appellant.

Exhaustion of State Remedies—As to the pursuit of State remedies, the District Court found that Middlebrooks had petitioned for habeas corpus to the Courts of California, successively from the lowest to the highest; that he had further unsuccessfully petitioned successively

to the Supreme Court of California and to two justices of the United States Supreme Court for a stay of execution of the warrant of extradition so that he could petition for certiorari to the Supreme Court of the United States from the State judgment denying his habeas corpus petition; that Middlebrooks did not file a petition for certiorari but that it would have been futile for him to do so in the absence of a stay of execution of the warrant because the petition would have been rendered moot by Middlebrooks' extradition; and that there was no remedy available in the Courts of the State of California other than the petitions for a writ of habeas corpus [R. 86-87, Findings 9 and 10; see allegations of present Petition with respect to State petitions for habeas corpus par. 6, R. 8, and admission of truth of allegation in return, par. III, R. 13; as to petitions for stay, see R. 206-212].

Petitioner's Conviction and Sentence. Middlebrooks, a Negro, was indicted in Georgia in 1934 on five counts of burglary which was an offense punishable by a maximum of 20 years in the penitentiary; the indictment was based on acts allegedly committed by Middlebrooks at the age of 14 [R. 83, Finding 3; see indictment, R. 21-27, juvenile case record, R. 126; District Court's discussion, R. 48, note 2; Middlebrooks' testimony, R. 135]. He was then seventeen years of age, with an education only to the third grade of school and unfamiliar with the criminal law [R. 83, Finding 3; see R. 123-129; R. 126, Petr's Ex. 1]. After being held in jail for several months, he was summarily summoned to trial upon fifteen minutes' notice by his jailor [R. 83, 129-134]. He was never given or shown a copy of the indictment; he was not arraigned, nor asked to plead; his request for an attorney was ignored, and he did not have the advice of counsel before

or at any stage of the proceeding [R. 83-84, 134-136; and see statement on indictment that defendant waived arraignment, and waived copy of the bill of indictment and list of witnesses, and see omission of name of counsel, R. 27]. Without the holding of a trial, Middlebrooks' case was disposed of by the judge sentencing him to five years' imprisonment [*Ibid;* and R. 54-55, including note 4; R. 28-39].

Conditions on Chain Gang—Middlebrooks was assigned for service of his sentence to a chain gang where he continuously engaged in painful labor [R. 142-3, 145] under brutal and inhuman conditions [R. 84]. He at all times was forced to wear an iron shackle on each ankle, connected by a heavy chain about 16 inches long [R. 147, 166]. He was housed in a large room with no toilet facilities except for an uncovered and leaking can [R. 140-142]. He was frequently whipped and beaten by guards [R. 145, 158-9] and confined in the stocks and sweat boxes as disciplinary meaures; in the stock Middlebrooks was seated on the narrow edge of a two-by-four board with his wrists and ankles placed through holes in a board in front of him, causing his body to lean forward at a forty-five degree angle. Another two-by-four board was wired across his knees to force his legs to remain straight. When he was removed from the stock he was unable to walk and had to be dragged to the living quarters [R. 85; see R. 151-154]. The sweat box "consisted of a small space three feet wide and six feet long, without light, heat or ventilation. When confined in the sweat box petitioner was deprived of clothing, given two blankets for covering and bread and water for food. Petitioner spent up to seven consecutive days in such a sweat box." [R. 85; see R. 154-157.]

Inseparability of Chain Gang Conditions From Sentence —The above-described conditions were of general application to persons confined upon conviction of felony and consisted of systematic, deliberate and methodical employment of aggravated brutality. These methods and practices were at all times herein material, and are, open, notorious and of long standing. This form of imprisonment and punishment was an integral part of the penal system of the State of Georgia at the time that Middlebrooks was sentenced and at all times that he was confined in the State of Georgia; it is such at the present time. Confinement in a chain gang subject to the conditions set forth above was an inseparable part of the sentence imposed upon Middlebrooks [R. 86, 140-159, 166, 175-7, 180-189, 191-2].

Conclusions of Law and District Court's Opinion in Support Thereof.

Conclusions 1 and 10.

The Court concluded that Middlebrooks had "exhausted all remedies available to him in the courts of the State of California" [R. 88]. While the Supreme Court and this Court have stated that ordinarily State remedies cannot be deemed exhausted until the filing of a petition for certiorari, at the same time they have both made it clear that the petition need not be filed if it is a futility [R. 70-71]. In view of the failure to secure a stay of extradition, a petition for certiorari would have become moot by reason of Middlebrooks' removal from California; under the circumstances, State remedies were exhausted and a petition for habeas corpus to the Federal courts was appropriate without the filing of a petition for certiorari [R. 71, 88-9, 91].

Conclusions 4 and 5.

Middlebrooks' conviction violated the due process of law guaranteed by the Fourteenth Amendment in that it was rendered in the absence either of a plea of guilty or of a trial and finding of guilty [R. 61-62, 89-90]. It was further a violation of due process of law in that he was not afforded the assistance of counsel [R. 89]. The Supreme Court has established that counsel must be afforded when necessary for an adequate defense against a serious charge [R. 58-59]. Here in view of Middlebrooks' youth, and lack of education, and in view of the lack of judicial diligence in protecting his rights, counsel was essential for Middlebrooks' protection [R. 60-61].

Conclusions 6 and 7.

While the Supreme Court has not definitely passed upon the question of whether freedom from cruel and unusual punishment, guaranteed as against the Federal Government by the Eighth Amendment, is guaranteed against State action by the due process clause of the Fourteenth Amendment, a recent opinion clearly indicates that the due process clause should be so interpreted [R. 63-64]. And this interpretation is supported by the basic and fundamental nature of the right to be free from cruel and unusual punishment [R. 65-66]. Accordingly, cruel, unusual, and inhuman punishment is a violation of due process of law [R. 90, Conclusion 6]; and the conditions under which Middlebrooks served his sentence and which were an inseparable part of it constituted such cruel and unusual punishment in violation of due process [R. 90].

CONCLUSIONS 2, 3, 8 AND 9.

California's custody of Middlebrooks for extradition to Georgia is in violation of due process of law, because it is based upon the unconstitutional judgment and sentence against him; such custody is to effectuate the unconstitutional judgment and sentence, thus rendering California an active participant in its enforcement [Concl. 2 and 3, R. 89]. Since the conviction was void and of no legal effect, California can acquire no jurisdiction over Middlebrooks on the basis thereof [Concl. 8 and 9, R. 90-91, 68]. California's custody of Middlebrooks is unconstitutional for the further reason that if Middlebrooks were returned to Georgia he would again be subjected to cruel and unusual punishment [R. 91, 68-69].

While Article IV of the Constitution provides for extradition, it does not require or permit a rendition in violation of the Fourteenth Amendment [R. 69]. And the policy argument that the extradition should proceed without regard to the constitutional questions is based on the unrealistic reasoning that Middlebrooks will have an opportunity to argue these question in Georgia [R. 71-72] and on a disregard of the principle that constitutional rights and liberties must be protected wherever questions in regard to them arise [R. 74]. Since Middlebrooks is in California's custody in violation of the Constitution, the petition for his release must be granted by the courts with jurisdiction in California [R. 76-7].

POINTS TO BE ARGUED AND SUMMARY OF ARGUMENT.

I.

It Was Necessary and Proper for the District Court to Determine Whether California's Custody of Appellee Was Unconstitutional, Because He Had Exhausted His Remedies in the State Courts Without Securing a Full Adjudication of This Issue.

There is no question that Middlebrooks exhausted his remedies in the California courts except for the issue with respect to his failure to file a petition for a writ of certiorari in the United States Supreme Court (App. Br. pp. 74-75). But in *Darr v. Burford,* 339 U. S. 200, the very decision in which the Supreme Court laid down the rule that ordinarily a petition for certiorari must be filed in order to exhaust State remedies, it approved the principle that no futile remedy need be pursued. The District Court's view that the filing of a petition for certiorari would have been futile in the instant case because of the failure to secure a stay, and that State remedies were exhausted without such filing is thus in accord with the Supreme Court's decisions, as well as with the tenor of this Court's opinion in *Morgan v. Horrall* and with the holding on the identical point by the Second Circuit. Since the question at issue in the instant proceeding is the validity of California's custody of Middlebrooks, it is clear that only Middlebrooks' actions in the California courts, and not in the Georgia courts, are relevant to the procedural question of the propriety of resort to the Federal courts in California.

The Constitutional questions considered by the District Court had not been fully adjudicated by the State courts; accordingly, the latter's judgments presented no barrier to the District Court's examination of these issues.

II.

It Was Necessary and Proper for the District Court to Consider and Determine the Constitutionality of the Conviction and Sentence Which Was the Basis for, and Would Be Enforced by, Appellee's Extradition.

The Supreme Court has expressly stated that the scope of inquiry in an extradition case by the courts in the asylum state is flexible and that there are no such rigid and mechanical limits to it, as appellant has depicted. The decisions indicate that the essential validity of the purpose and of the basis for the demand is within the scope of inquiry, and that the appropriateness and feasibility of adjudication in the asylum state of the particular question at issue is the criterion of the scope of inquiry. Under both of these tests, the question of the constitutionality of appellee's conviction and sentence was properly deemed by the District Court to be within its scope of inquiry.

Since none of the Supreme Court extradition decisions are squarely in point in the instant case, because all deal with extradition for the purposes of trial rather than the somewhat dissimilar question of extradition after conviction, Supreme Court doctrines as to the effect to be accorded a judgment under the full faith and credit clause of the Constitution are highly persuasive, if not controlling, authorities in the instant case. It is established beyond question by the Supreme Court decisions that the full faith and credit clause does not require or permit a

judgment which has been rendered in violation of due process to be enforced or effectuated in a sister state. The full faith and credit provision is highly similar in purpose and tenor to the Constitutional provision on extradition; and it follows that the extradition provision does not, any more than the full faith and credit clause, countenance state action on the basis of an unconstitutional judgment of another state. Thus, the fact that Middlebrooks' custody was for extradition did not relieve the Court below upon a petition for habeas corpus, from its usual responsbility of determining upon habeas corpus whether custody is based upon and to enforce an unconstitutional conviction.

The propriety and necessity of the District Court's adjudication herein of the constitutionality of appellee's conviction and sentence is not diminished because of the theoretical possibility that he might some time in the future be able to litigate this question in Georgia. The Court cannot ignore the reality that in view of appellee's poverty, ignorance, background, the immediacy of his incarceration if he were returned to Georgia and lack of representation in his previous trial in Georgia, there is a practical certainty that he would be unable to obtain judicial relief in Georgia because of lack of counsel and inability to represent himself. Even assuming, however, the possibility of a remedy at some indefinite time in Georgia, appellee was faced with the certainty of irreparable injury through detention for at least a substantial period of time if his extradition was not judicially re-

strained, and the determination of whether his detention was constitutional was thus required in the instant proceeding under well-established principles.

The Fourteenth Amendment must be deemed to apply when the State exercises its power to extradite with the same force and effect as it applies to all other exercises of State power. Since State action based upon or to enforce a violation of the Fourteenth Amendment is itself a violation of the Amendment, California's custody of Middlebrooks, based upon and to enforce the Georgia conviction and sentence, was unconstitutional if the conviction and sentence were unconstitutional; consideration of the latter question was thus incumbent upon the Court below.

Of the Circuit Courts which have dealt with the instant problem, the Court of Appeals for the Third Circuit has squarely held in accord with the decision of the District Court herein, and the Court of Appeals for the Second Circuit has indicated its concurrence with this view. While the opinion of the Court of Appeals for the District of Columbia is of contrary tenor, it considered the somewhat dissimilar question of extradition for trial rather than after conviction; and its opinion did not in any event take into account pertinent Supreme Court opinions and important policy considerations.

III.

California's Custody of Middlebrooks for Extradition Was Unconstitutional Because His Conviction and Sentence, Upon Which the Extradition Demand Was Based and Which It Was to Enforce, Violated the Due Process Guarantee of the Fourteenth Amendment.

Even accepting the statements noted on Middlebrooks' Georgia indictment at their face value, and without regard to the District Court's findings as to their partial inaccuracy, it is clear that his conviction contravened due process. For the indictment states that Middlebrooks "waived" notification of the charges against him, and also shows that he was not afforded counsel. No waiver by a person of Middlebrooks' ignorance, acting without the advice of counsel or of any experienced person, is effectual to relieve the State of its duty of affording basic procedural protection to the accused. And in view of Middlebrooks' circumstances, combined with the complete failure of the convicting judge to protect Middlebrooks' rights, it was a violation of due process to fail to afford him counsel. Further, the District Court's findings that not even the regularity of procedure indicated by the indictment was in fact afforded Middlebrooks are well supported; and he was thus denied any semblance of due process.

The protection afforded by the Fourteenth Amendment must be deemed to include the prohibition against cruel and unusual punishment established by the Eighth Amendment. The conditions on the chain gang, on which Middlebrooks served his sentence, as the District Court found, showed a systematic brutality which constituted cruel and unusual punishment. The imposition of these conditions was an inseparable part of his sentence and is inevitable in the event Middlebrooks is returned to Georgia.

Thus, California's custody of Middlebrooks for extradition is not only based on an unconstitutional conviction and sentence, but California's custody is the *sine qua non* for Georgia's further enforcement of it. Such aid in the affectuation of an unconstitutional conviction and sentence is itself unconstitutional, and the District Court was therefore correct, under its power to grant release from an unconstitutional custody, to order Middlebrooks' release.

IV.

It Was Necessary and Proper for the District Court to Determine Whether California's Custody of Appellee Was Unconstitutional Because He Had Exhausted His Remedies in the State Courts Without Securing a Full Adjudication of This Issue.

A. Exhaustion of State Remedies.

It is clear, as the District Court concluded [R. 88], that appellee had, prior to petitioning the District Court, "exhausted all remedies available to him in the courts of the State of California" to secure his release from custody [see also R. 87, Finding 10]. He had in turn petitioned for habeas corpus to secure the relief herein sought, in the Superior Court of California, the District Court of Appeal, and the Supreme Court of the State, which were the only state courts with jurisdiction to receive such a petition; habeas corpus was the only State method by which Middlebrooks could attempt to secure his release from custody and each of his petitions was denied [R. 86-87].[1] In order to have an opportunity to petition for

[1]The successive applications are necessary to exhaust state remedies. In cases of this kind in California an appeal does not lie to review a lower court decision denying the writ (Cal. Penal Code, Sec. 1506; *Loustchat v. Superior Court,* 30 Cal. 2d 905).

certiorari to the Supreme Court of the United States, appellee then applied for a stay of execution to the Supreme Court of California; after its denial, he in turn applied for a stay to two United States Supreme Court Justices: to the surpervising Justice for this Circuit, Mr. Justice Douglas, and to Mr. Justice Black [R. 87]. When all stays were refused, he commenced the instant action.

The District Court found that, in the absence of a stay, "it would have been futile for petitioner to have applied to the United States Supreme Court for a writ of certiorari because . . . petitioner would have been transported to Georgia and his petition to the United States Supreme Court would have become moot" [R. 87]; hence, the District Court concluded that state remedies had been exhausted without the filing of the petition for certiorari [Concl. of Law 1 and 10, R. 88-9, 91].

The appellant does not dispute the District Court's findings; and his only argument against its conclusions is his citation of *Darr v. Burford,* 339 U. S. 200, in which the Supreme Court declared that certiorari must ordinarily be sought from a State Court judgment before resort to the Federal District Court. However, in that very opinion the Court reiterated the principle, from which it has never shown any deviation, that certiorari, like other remedies, need not be sought, if it would be a futile gesture (see 339 U. S. at p. 209). And see *White v. Ragen,* 324 U. S. 760, 765, cited with approval in the *Burford* opinion, where the Supreme Court held that State remedies were exhausted without a petition for certiorari because it appeared that such a petition would have been futile. There can be no doubt of the futility of a petition for certiorari in the instant case in view of the fail-

ure to secure a stay; thus, as this Court indicated in *Morgan v. Horrall,* 175 F. 2d 404 (1949), with appellee's unsuccessful applications for a stay, he exhausted his remedies under State law.[2] The precise point was ruled upon by the Second Circuit in a highly similar extradition case, in which it held that the Federal District Court properly assumed jurisdiction over the petition for habeas corpus, saying:

> "We think the refusal of the stay as described completed the exhaustion of state remedies because, unless a stay was granted by someone having authority to grant it the relator would certainly have been returned to Georgia and his case would have become moot so far as New York State was concerned." (*Jackson v. Ruthazer,* 181 F. 2d 588, 589 (1950), cert. den. 70 S. Ct. 1027.)

B. Failure of State Courts to Render Full Adjudication of Constitutional Questions.

Since there was no opportunity for Middlebrooks to petition for certiorari to the United States Supreme Court from the State Court judgment, there was no completion of the adjudicatory process commenced in the State courts and examination by the District Court of the Federal questions was undoubtedly necessary. As pointed out in *Ex parte Hawk,* 321 U. S. 114, 117 [quoted by the District Court, R. 75], it is only after a full adjudication by the State courts and either review or a refusal to review by the Supreme Court that a Federal Court may refuse to reexamine "the questions thus adjudicated."

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[2]In the *Morgan* case, the holding was that State remedies had not been exhausted since the prisoner had made no attempt to secure a stay in order to enable him to petition for certiorari.

In addition to this independent and sufficient ground for the District Court's examination of Middlebrooks' constitutional contentions, the State courts' judgments do not diminish the necessity for adjudication by the District Court because of the nature of their deliberations. No opinion was delivered either orally or in writing by any of the State courts in denying the petitions for habeas corpus. Thus there is no possibility of a clear showing that the State courts thoroughly examined, or even considered, the appellee's constitutional contentions, and only a certainty that they did so would justify a Federal Court's refusal to determine whether appellee's custody violates the Constitution (see *Ex parte Adamson,* 167 F. 2d 996). But even if a Federal Court could deny a remedy for a violation of constitutional right merely on the basis of conjecture as to the State courts' actions, the most favorable conjecture possible in the instant case is that a full consideration of the unconstitutionality of appellee's detention was accorded by the lowest California Court, the Superior Court for the County of Santa Barbara, which alone accorded a hearing [R. 86]. Assuming the upper courts gave any consideration to the Federal questions, they could not have done more than to determine that the Constitution dictated the limited scope of inquiry in extradition proceedings for which appellants have at all times contended [R. 211]; for in both of the upper courts the petition was denied without a hearing [R. 87. Finding 9], which would have been essential in order for the Court to pass upon the appellee's contentions as to the unconstitutionality of his Georgia conviction and sentence.

Thus, assuming most favorable conjecture as to the California Court's actions, the upper State courts deter-

mined a preliminary Federal Constitutional question of an important and controversial nature in such a way as to foreclose their consideration of the other constitutional issues involved. In this situation, even aside from the fact that the circumstances precluded the possibility of review by the United States Supreme Court of the correctness of the preliminary determination, the District Court would have been remiss in its functions if it had refused appellee access to the Federal courts for consideration of his constitutional contentions. At most, the rule that the Federal courts will not re-examine questions determined by the State courts applies only under *ordinary* circumstances. [See *Ex parte Hawk,* 321 U. S. 114, 117, quoted by the District Court, R. 75, 76.] And this policy applies, primarily, to questions of State law and to questions of fact, or to mixed questions of law and fact. See *Morgan v. Horrall,* 175 F. 2d 404, 407 (1949), in which this Court pointed out that "a clear and convincing showing of a violation of . . . rights under the Federal Constitution" required an exception to the policy of refusing to disturb a State Court adjudication. In any event, as stated in the *Hawk* case, "where resort to state court remedies has failed to afford a *full* and fair adjudication of the federal contentions raised . . . a federal court should entertain the petition for habeas corpus, else he would be remediless." (321 U. S. at p. 118, italics added.) The examination by the State courts of the constitutional questions, was not taken in its best light, "full."

The Second Circuit, in *Jackson v. Ruthazer, supra,* clearly indicated that the State courts' determination of the preliminary issue of scope of inquiry was not a sufficient examination of the issues to deter their full adjudication by a Federal Court. There the Court held that it need not re-examine the issues because the New York State courts had held a hearing on the merits of the fugitive's constitutional objections and had determined that his punishment in Georgia was not in fact "cruel and unusual" (181 F. 2d at p. 589); it is indubitable from the opinion that if the State courts had decided the scope of inquiry question adversely and had not decided all the issues on the merits, the Second Circuit would have deemed it necessary and proper for the Federal courts to examine the constitutional issue. (Compare *Rose v. Mangano,* 111 F. 2d 114 (C. A. 2d 1940).)

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The issue of whether the District Court's judgment was correct from the standpoint of the exhaustion of State remedies in no way involves the Georgia courts; the custody to which the District Court's writ was directed was that by the State of California, and the only State courts which could have released appellee from it were the California courts. The role of the Georgia courts is pertinent only to the question of the propriety of the consideration of the constitutionality of appellee's conviction by any of the courts in the place of asylum, and will be considered in that connection below.

V.

It Was Necessary and Proper for the District Court to Consider and Determine the Constitutionality of the Conviction and Sentence Which Was the Basis for, and Would Be Enforced by, Appellee's Extradition.

The District Court's judgment is based on the position, which will be argued in Point III, that Middlebrooks' detention by California for extradition was unconstitutional because the conviction and sentence upon which the extradition was based and which it would enforce was unconstitutional. Appellant's only argument against the District Court's judgment is his view that the constitutional provision on extradition, as interpreted by the Supreme Court, precludes consideration of the constitutionality of the conviction and sentence even though they were the basis for the extradition demand and were being enforced through Middlebrooks' custody for extradition. We shall show that while the Supreme Court has never had occasion to rule upon the precise question here in issue, its decisions on extradition, including all those cited by appellant, support the District Court's position as to the necessary scope of its inquiry. Since, however, the Supreme Court extradition decisions are not squarely in point in the case at bar, we shall demonstrate that the District Court's approach is dictated by other pertinent principles as to constitutional rights and remedies; further, we shall show that of the three Circuit courts which have dealt with various aspects of the instant problem, the clear weight of opinion of the Circuit judges is in accord with the District Court.

A. The Supreme Court's Extradition Decisions Show the Propriety of the District Court's Consideration of the Constitutionality of Appellee's Conviction and Sentence.

The extradition clause of the Constitution (Art. IV, Sec. 2, Clause 2) only governs the return of a "person charged in any State with . . . crime" to "the State having jurisdiction of the crime" for trial.

It is clear from the phraseology of this provision that the draftsmen were concerned only with the extradition of fugitives in order to secure their presence for trial, and the Supreme Court has repeatedly stressed the rendition of fugitives for trial as the purpose of the constitutional authorization.[3] Thus, the policy as to scope of inquiry embodied in this provision was directed solely at the case of extradition before trial, and is pertinent in the instant case of extradition after conviction only insofar as dictated by resemblances in the two types of cases.[4] Simi-

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[3]See *Lascelles v. Georgia,* 148 U. S. 537, 542; *Appleyard v. Massachusetts,* 203 U. S. 222, 227.

[4]The fact that extradition after conviction has sometimes been assumed to fall technically within the category of an extradition based on a charge does not alter the fact that the purpose of such an extradition is something other than trial of the fugitive and that the policy of the section was not formulated with a view to such an extradition. The purpose of this technicality was so that the extradition might be considered within the authority to extradite conferred by Article IV. See *Reed v. Colpoys,* 99 F. 2d 396 (App. D. C. 1938); but compare *Breuer v. Goff,* 138 F. 2d 710 (C. A. 10th, 1943). An argument that extradition after conviction was not authorized by the constitutional provision does not seem to have ever been advanced. Since passage of the Federal Act giving the permission necessary under Art. I, Sec. 10, par. 3 for the States to enter into fuller extradition compacts, it is no longer necessary to support extradition after conviction by this artificial reasoning. In the instant case Georgia has stated that the purpose of the extradition is to again confine Middlebrooks to complete service of his sentence [R. 19]: thus, whether or not the extradition is viewed as technically based on the indictment, it is clear that its purpose is not the securing of a fugitive for trial.

larly, the Supreme Court decisions all deal with the problem of rendition of fugitives for trial.

The problem of extradition of fugitives after conviction is obviously of a far different scope from extradition for purposes of trial; fugitives after conviction are numbered by those few who contrive to escape, whereas in the absence of extradition for purposes of trial all criminals could find refuge by merely crossing state lines after their criminal acts. And the problem of inquiry by the asylum court in the two cases likewise has marked differences. But aside from the sound grounds for distinction with respect to this question between the case of extradition after conviction and extradition for purposes of trial (discussed *infra*), we submit that a complete reading of the Supreme Court decisions, rather than a mere culling of general language therefrom as in appellant's brief, indicates the propriety even in the latter type of case of consideration by the courts in the asylum state of the constitutionality of the conduct on which the extradition demand is predicated.

Marbles v. Creecy, 215 U. S. 63, appears to be the only Supreme Court case in which any question was presented as to the unconstitutionality of the purpose and result of the extradition, which is the issue at bar. There the Supreme Court said that since the allegations that the extradition would not be followed by a fair trial were not supported, it could only assume that the object of the extradition was the holding of a fair trial (215 U. S. at pp. 69-70). The Court did *not* rule the question of the object of the extradition to be outside of the scope of inquiry, as appellant has argued herein. Rather, its language indicated that if there were evidence to support

allegations as to the prospective unconstitutional result of the extradition, the courts in the asylum state would be required to determine their truth, and to order the fugitive's release from custody if the result of the extradition would be unconstitutional;[5] thus, the *Marbles* case clearly supports the District Court's decision in the case at bar.

While none of the other Supreme Court decisions bear as directly on the instant case, they are significant like the *Marbles* case in showing that there are no rigid and mechanical limits to the scope of the inquiry by the courts in the asylum state, such as appellant pictures. Indeed, the scope of extradition hearings, the Court declared, "has not, perhaps should not be, determined with precision" (*Biddinger v. Commissioner,* 245 U. S. 128 at p. 134.)

But that the essential validity of the basis for the demand must be deemed within the scope of the inquiry in the asylum state is indicated by several decisions. Thus, the Supreme Court has repeatedly held that the courts in the asylum state must determine whether the "detention [for extradition] was in violation of the Constitution" and that to establish that the custody was constitutional, it "must appear . . . that the person demanded is *substantially* charged with a crime . . . (This) is a question of law, and is always open . . . on an application for a discharge under a writ of habeas corpus." (Italics added.) (*Appleyard v. Massachusetts,* 203 U. S.

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[5]See *Commissioner ex rel. Mattex v. Superintendent of City Prison,* 152 Pa. Super. 167, 31 A. 2d 576 (1943), where the Court, relying on the *Marbles* case, ordered a release from custody for extradition upon the showing that the fugitive was likely to be lynched if extradited and thus the holding of a trial would be prevented.

222, 226, 228. *Semble, McNichols v. Pease,* 207 U. S. 100, 107, 108.) The Court has not explicitly defined the meaning of its phrase "substantially" charged with crime, which has been repeated from case to case; but it seems clear from the *Appleyard* opinion that the "question of law" which "is always open" is whether there is a minimum valid basis for the charge on which the extradition demand is predicated, so that it is reasonable to subject the fugitive to the extradition. Since only a *charge* of crime was involved, a *substantial* charge would satisfy the criterion of reasonableness.

In application of this principle in *Drew v. Thaw,* 235 U. S. 432, the Court considered in detail whether the legal theory of the indictment was tenable, and held that Thaw's custody for extradition was valid, only because there was "here a reasonable possibility it (the act charged) may be a crime" (235 U. S. at p. 440). Thus, the Court determined whether there was a minimum valid basis for the demand and for the fugitive's subjection to trial: the process for which he was being extradited;[6] analogizing to the instant situation, inquiry would be required as to whether there is a constitutional basis for Middle-

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[6]It is to be noted that the authority of the above-discussed cases is not opposed by any in which the Court has refused to consider the validity of the charge upon which the extradition demand was based.

In *Pearce v. Texas,* 155 U. S. 311, the Court refused to consider the constitutionality of the statute which established the offense the fugitive was charged with committing. Obviously, however, the possible unconstitutionality of the statute would not render it unconstitutional to charge the fugitive with the crime or try him for it. Thus, the *Pearce* case is not contrary to the argument in the text that the constitutionality of the basis for the demand—whether a charge or a conviction,—and of the result of the extradition are to be considered.

brooks' conviction and sentence and for the confinement the demanding State intends to impose.

Likewise, of great pertinence in demonstrating the correctness of the District Court's decision herein, is the principle embodied in these opinions that the criterion for determining whether a question is within the scope of inquiry is the appropriateness under all the circumstances of its adjudication in the asylum State. Thus, in the *Biddinger* case, in holding that the effect of the Statute of Limitations is not a question requiring adjudication in the asylum State, the Court pointed out the flexibility of the scope of inquiry (see *supra,* p. 23) and rested its holding on the reasoning that the particular defense of limitations is one that "must be asserted on the trial by the defendant in criminal cases; and the form of the statute of Illinois . . . makes it especially necessary that the claimed defense of it should be heard and decided by the courts of that State." (245 U. S. at p. 135.) Similarly, in *Drew v. Thaw, supra,* the Court's conclusion rested on the grounds that, there being "a reasonable possibility" the indictment stated an offense (discussed *supra,* p. 24), the courts in the State of asylum should not determine definitively whether or not the fugitive's defense of insanity was valid, because this defense under the circumstances posed a complicated question of law and fact which probably had to be determined on the basis of a trial or at least on the basis of the law of the demanding State.

We submit that the Supreme Court's language as to the limitations of the extradition inquiry related solely to the inappropriateness of determination by the courts of the asylum State of defenses connected with the trial of

the charge, which was the issue in all the cases to come before it. While the Supreme Court decisions thus fail to support appellant's position, several points supporting the District Court's decision are clear from the opinions:

(1) The one opinion of the Court which concerns the possible unconstitutionality of the process to which the demanding State will subject the fugitive as the result of the extradition, clearly indicates that such an unconstitutional result is within the scope of inquiry in the asylum State and that the fugitive should be released from custody if the result of extradition would be an unconstitutional act in the demanding State (*Marbles v. Creecy, supra*).

(2) While none of the other opinions concern the constitutionality of the basis or result of the demand, they indicate that the essential validity of the basis and result is within the scope of inqury: in a case such as the instant one where the demand is predicated on a conviction and sentence, this principle would necessitate examination of their constitutionality (*Appleyard v. Massachusetts, supra*).

(3) The appropriateness under all the circumstances of adjudication in the asylum state of the particular question at issue is the criterion of the scope of inquiry (*Biddinger v. Commissioner, Drew v. Thaw, supra*). As we shall show in Point C, consideration in the asylum State of the constitutionality of the conviction and sentence was highly appropriate in the instant case.

(4) The Constitutional provision on extradition has not been construed as setting definitive and rigid limits to the scope of inquiry in the asylum state, even in the case of

extradition for the purpose of trial, which is the type of extradition at which the Constitutional provision was directed. *A fortiori,* it does not indicate such limitations for the case of extradition after conviction, in which, as we shall show in Point C, rigid limits are even less appropriate than in the case of extradition for trial. Accordingly, consideration of general principles pertinent to the scope of a habeas corpus inquiry is warranted in determining the correctness of the District Court's judgment herein. These principles, considered in Point C, establish the propriety of the District Court's consideration of the constitutionality of Middlebrooks' conviction and sentence.

(5) The constitutional provision on extradition has not been construed as rigidly compelling extradition under any and all circumstances, and it is only this extreme view as to the compulsive nature of the clause which would lend support to appellant's position. Absent such support, it is indubitable as we shall show in Point D that the State is limited in the exercise of its power to extradite, as in the case of all its other powers, by the Fourteenth Amendment. And because it is a violation of the Fourteenth Amendment to aid in the enforcement of a conviction rendered in violation of the Amendment, California's custody of Middlebrooks for extradition was a violation of the Amendment.[7] Accordingly, to determine the constitutionality of California's custody, the District Court's scope of inquiry necessarily included the constitutionality of Middlebrooks' conviction and sentence.

(6) None of the Supreme Court decisions are squarely in point in the case at bar, since none of them concern an extradition to enforce a judgment of conviction and

[7]See Point III, *infra.*

sentence, which is in some respects a dissimilar problem from that of extradition for purposes of trial. We believe that the Supreme Court's decisions as to the effect to be accorded under the full faith and credit clause to judgments of a sister state are of controlling authority herein, as will be shown in Point B.

B. The Supreme Court's Construction of the Full Faith and Credit Clause of the Constitution Clearly Establishes the Propriety of the District Court's Consideration of the Constitutionality of Appellee's Conviction and Sentence.

It is established beyond question that in applying the full faith and credit clause of the Constitution the courts must consider whether the judgment of another state which they are asked to enforce was rendered in violation of due process, and that it must be refused enforcement if it was so rendered (see cases discussed *infra*). We submit that these decisions are of controlling authority with respect to the proper procedure in extradition. For the full faith and credit clause is like the extradition provision, set forth in Article IV of the Constitution; and it is couched in equally mandatory terms, the full faith and credit provision reading: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State" (Constitution, Art. IV, Sec. 1). And the purpose and significance of the two provisions are highly similar. Thus, the Supreme Court's reiterated opinion that the " 'very purpose' of Article IV, section 1 was 'to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation' "[8] is strik-

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[8]*Williams v. North Carolina,* 317 U. S. 287, 295; see also *Broderick v. Rosner,* 294 U. S. 629, 642-643; *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 439.

ingly comparable to its opinion on the function of extradition (see quotations in appellant's brief pp. 30, 33, and opinion by District of Columbia Court of Appeals in *Johnson v. Matthews,* set forth in appellant's brief in appendix pp. 8-9).

Despite the command of the full faith and credit clause, the Supreme Court has never deviated from the principle that it is only "when a court of one state (is) acting in accord with the requirements of procedural due process" that its judgment is to be credited in sister states (*Williams v. North Carolina,* 317 U. S. at p. 303). "The duty of a state to respect the judgment of a sister state arises only where such judgments meet the tests of justice and fair dealing that are embodied in the historic phrase 'due process of law.'" (Justice Frankfurter concurring in the *Williams* case, 317 U. S. at p. 306.) Semble:

Griffin v. Griffin, 327 U. S. 220, 228.

Not only *may* the sister state consider the question of whether the judgment contravened due process, but, the due process clause *compels* such consideration. For "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process" (*Griffin v. Griffin,* 327 U. S. at page 229). Indeed, the conclusion that a judgment lacking due process cannot be given effect, despite the full faith and credit clause, is dictated by several doctrines the Court has developed with respect to this clause. For the judgment of a sister state is always open to attack on the basis of a want of jurisdiction in the court rendering it;[9]

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[9]See *Hansberry v. Lee,* 311 U. S. 32; *Adam v. Saenger,* 303 U. S. 59; *Treinies v. Sunshine Mining Co.,* 308 U. S. 66, 78.

and since a violation of constitutionally guaranteed procedures results in a complete lack of jurisdiction and a void judgment,[10] the due process question must be reviewed in a sister state. Further, since a judgment lacking due process cannot be given effect in the state in which it is rendered, it likewise cannot be given effect in a sister state. As the Court has pointed out: "A rigid and literal enforcement of the full faith and credit clause . . . would lead to the absurd result that . . . the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Association v. Commission,* 294 U. S. 532, 547. See *Halvey v. Halvey,* 330 U. S. 610; *Morris v. Jones,* 329 U. S. 545; and *Roche v. McDonald,* 275 U. S. 449, as to the unenforceability in a sister state of a judgment unenforceable in the state of origin.

We believe that these decisions are controlling in the instant case, and that they show that the District Court's consideration of the constitutionality of Middlebrooks' conviction and sentence was not only proper but unavoidable. To sum up these cases in their application to the case at bar: if the Georgia judgment which the extradition would enforce and effectuate, was rendered in violation of due process, it would be a violation of due process to enforce it, and its enforcement by extradition would be invalid in that the judgment would thereby be effectuated although it could not have been effectuated in Georgia. The extradition clause of the Constitution cannot be interpreted to override and negate the doctrines of the above-discussed cases, which reflect the sweeping

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[10] *Johnson v. Zerbst,* 304 U. S. 458, 468; *Smith v. O'Grady,* 312 U. S. 332, 334.

force of the due process clause and the basic nature of the judicial process, any more than has the full faith and credit clause; particularly must this be true since the full faith and credit clause in terms commands credit to judgments of a sister state and the extradition provision, as already noted, applies in the case of an extradition to enforce a judgment only by analogy.

Thus, the fact that appellee was being held for extradition did not obliterate the District Court's usual duty upon habeas corpus of ordering the release of a prisoner held in custody on the basis of an unconstitutional and void conviction;[11] indeed, it would have been a violation of due process to permit the continuance of Middlebrooks' custody if it was so based. It was as much a judicial duty for the courts in California to order Middlebrooks' release from California's custody as it would have been for the Georgia courts to order his release from his custody in Georgia pursuant to the void conviction. It was therefore incumbent upon the District Court to consider whether the Georgia conviction was rendered in violation of due process. Since it was entirely void if it was so rendered, it was subject to collateral attack in any and every proceeding in which it was brought in issue.[12]

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[11] *Smith v. O'Grady; Johnson v. Zerbst,* loc. cit. *supra,* note 10.

[12] When the court "acts without authority, its judgments and orders are regarded as nullities, they are simply void. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers." (*Eliott v. Peirsol,* 1 Pet. (26 U. S.), 328, 340.) If a "court is without jurisdiction . . . its proceedings are null and void even in a collateral proceeding." (*Hamilton v. Brown,* 161 U. S. 256, 267.) Of the numerous decisions asserting this principle, see also *Windsor v. McVeigh,* 93 U. S. 274; *United States v. Walker,* 109 U. S. 258; *McDonald v. Mabee,* 243 U. S. 90, 92.)

This principle is especially applicable when, as we shall show in Point III is the case herein, the invalidity of the judgment is apparent on the fact of the record.

C. It Was Feasible and Appropriate for the District Court to Adjudicate the Constitutionality of Middlebrooks' Conviction and Sentence; and This Adjudication Was Required by the Principles Pertaining to the Availability of Judicial Relief.

The appropriateness and feasibility of determining the question of the constitutionality of the conviction and sentence in the asylum state is pointed up by contrast with the situation in the case of questions arising in connection with the trial. As Mr. Justice Holmes noted in holding that the latter type of questions should not be examined in the asylum state, the Constitution itself provides for trial only in the state wherein the crime was allegedly committed (*Drew v. Thaw*, 235 U. S. at p. 4490). Questions arising in and connected with the trial therefore are not only inappropriate but impossible for the courts in the asylum state to determine efficaciously. In distinction to this situation, there is no constitutional obstacle to determination by the courts of the asylum state of the constitutionality of the conviction and sentence.

Furthermore, from the standpoint of availability of remedies, consideration of the constitutionality of the conviction and sentence is a far different question from consideration before trial of possible defenses. In none of the Supreme Court cases, all dealing with extradition before trial, was there any question as to the fugitive's practical or theoretical inability to secure an adjudication in the demanding state of the issues he was attempting to present in the asylum state. But the Court's reasoning that certain issues should not be examined in the asylum state because they could be determined better in the demanding state, assumes the certainty of an opportunity to secure a determination in the latter and shows that lack

of opportunity to present an issue in the demanding state must be deemed a significant factor in setting the scope of the asylum court's inquiry. While in the usual case of a fugitive before trial, as in the Supreme Court cases, there would be no question as to the fugitive's opportunity to present his defenses upon his trial after extradition, contrariwise, in the typical case of a fugitive's attack in the asylum state on the constitutionality of his conviction and sentence, and certainly in Middlebrooks' case, he would not have an opportunity to make this attack in the demanding state.

In the instant case the Court found it was "extremely remote" [R. 72] that Middlebrooks would be able to secure consideration of his constitutional objections if returned to Georgia; and we believe it is substantially certain that he would be unable to do so. This conclusion is clear without in any way impugning the judicial processes in Georgia. In view of Middlebrooks' lack of education and experience, and his immediate incarceration on his return to Georgia so that he would be deprived of the possibility of helpful contacts, he would certainly be unable to effectively present a petition for review of his conviction without counsel; it is hardly conceivable that he would even know the name of the court in which such a petition should be filed, or its location. And in view of his financial and social status, his lack of representation in his previous trial, and the fact that he would be immediately incarcerated on his return to Georgia, it can hardly be supposed he could obtain counsel. See *Smith v. O'Grady*, 312 U. S. 332, 334, where the Court points out as grounds for examination on habeas corpus of the constitutionality of a conviction, the allegations that the petitioner "had been rushed to the penitentiary where his ignorance, confine-

ment and poverty had precluded the possibility of securing counsel" to appeal from his conviction, and that he had been trying for eight years to secure review of its validity. Such a realistic lack of opportunity to secure a remedy in the demanding state would be typical in the case of a fugitive contesting extradition on the basis of the unconstitutionality of his conviction; it would be highly probable that he chose escape before attempting to present his constitutional objections because of his inability to do the latter in the demanding state. The Court cannot ignore the realities as to the availability of remedies; the whole problem of remedies as well as of the need for counsel is, and is uniformly treated as, essentially a pragmatic one.[13]

1. The Theoretical Possibility That Appellee Would Be Able to Litigate in Georgia the Constitutionality of His Conviction and Sentence Did Not Relieve the District Court of the Duty of Adjudicating This Issue in the Instant Proceeding.

Appellant stresses the view that the constitutionality of Middlebrooks' conviction and sentence would be open for consideration in Georgia if it were ignored in California and his extradition were permitted (Brief pp. 68-74). While a court may refuse to consider the constitutional basis for a detention because it has already been adjudicated (see *supra*, p. 19), it would be a wholly novel doctrine that the question of the constitutional basis for a detention may be ignored because it might receive the attention of some other court sometime in the future.

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[13]For examples of the numerous cases illustrating this approach, see *Young v. Ragen*, 337 U. S. 235; *King v. Order of United Commercial Travelers*, 333 U. S. 153; *White v. Ragen*, 324 U. S. 760, 765; *Haley v. Ohio*, 332 U. S. 596.

As the District Court pointed out [R. 74]:

> "If constitutional rights and basic liberties are to be protected, they must be protected in the courts where the questions arise and when the questions arise, and the shunting of a case from one court to another should as far as possible, be avoided."

Particularly must this principal be observed where the petitioner for the adjudication is restrained of his liberty; the writ of habeas corpus is to be used to "deal effectively with any and all forms of illegal restraint" (*Price v. Johnston,* 334 U. S. 266).

Furthermore, consideration of whether Middlebrooks' conviction has a constitutional and valid basis is dictated by the established doctrine that an adjudication must be accorded when there is a clear likelihood of irreparable injury from a postponement of consideration. It was incumbent upon the District Court to adjudicate Middlebrooks' contentions because of the certainty of his injury in the form of detention in California and imprisonment in Georgia for a substantial period of time, even if it were assumed, contrary to our argument above, that he could there eventually seek a remedy; his injury would obviously be irreparable and illegal if his detention were without a valid basis. Compare *Utah Fuel Co. v. National Bituminous Coal Co.,* 306 U. S. 56, and *Smith v. Illinois Bell Telephone Co.,* 270 U. S. 587, where the validity of proposed administrative action was determined in injunction proceedings, and the administrative proceedings were enjoined, despite the doctrine of exhaustion of administrative remedies and the certainty in these cases of the opportunity for a subsequent remedy, because of the likelihood of irreparable injury if the petitioner were forced to undergo the administrative procedure and subsequently

seek relief.[14] The instant situation is also closely analogous to that where the constitutionality of a criminal statute is determined in a suit to enjoin its enforcement because of the risk of irreparable injury if such determination is postponed until a criminal prosecution.[15] And where the possibility of another judicial examination of the alleged violation of constitutional rights is in fact as remote as in the instant case, a refusal to consider it in the instant proceeding would tend to be a denial of due process in that such a refusal would in effect constitute a deprivation of all remedy for the violation. Compare *Mooney v. Holohan,* 294 U. S. 163, 170; *Taylor v. Alabama,* 335 U. S. 252.

As against the foregoing principles which we believe made consideration of the constitutionality of the Georgia conviction and sentence mandatory, we do not believe views of policy, such as those expressed by the Court of Appeals for the District of Columbia[16] can be given any

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[14]See also *Great No. Ry. v. Merchants Elev. Co.,* 259 U. S. 285; *Pennsylvania v. West Virginia,* 262 U. S. 553, 592-595; *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 368, and *Oklahoma Natural Gas Co. v. Russell,* 261 U. S. 290, 293.

[15]For examples of the numerous cases so holding, see *Packard v. Banton,* 264 U. S. 140; *Terrace v. Thompson,* 263 U. S. 197; *Ex parte Young,* 209 U. S. 123; *Dobbins v. Los Angeles,* 195 U. S. 223.

[16]The District of Columbia court's assumption that the court in the asylum state would necessarily free the fugitive if it considered the constitutional questions thus seems to be ill-taken. And its argument that a state such as Georgia might welcome the escape of its prisoners to other states is somewhat puzzling, considering Georgia's attempts to extradite escaped fugitives; the court's suggestion that these attempts may merely be *pro forma* compliance with a constitutional duty seems without merit, for the Constitution imposes no duty to demand extradition. As to the Georgia officials' difficulty, suggested by the District of Columbia court, in presenting evidence to contest the fugitive's allegations, the District Court herein suggested that this could be done by affidavit [R. 53, note 3].

weight. However, it is to be noted that consideration of the constitutionality of the conviction in the asylum state will not inevitably lead to the liberation of fugitives, as that Court of Appeals feared. On the contrary, in a recent New York case, after hearing testimony by Georgia officials as to the prison system in a particular Georgia county the New York court concluded that the fugitive had not been sentenced to cruel and unusual punishment and refused to order his release on habeas corpus. See *Jackson v. Ruthazer,* 181 F. 2d 599 (C. A. 1950); cert. den. 70 S. Ct. 1027.[17]

D. Appellant's Argument as to the Scope of Inquiry Cannot Be Accepted Because It Would Require Excepting the Power to Extradite From the Doctrine That All State Action Is Limited by the Fourteenth Amendment.

As we have already argued in part and will further demonstrate in Point III, State action on the basis of and to aid in the enforcement of a conviction rendered in violation of the Fourteenth Amendment, is likewise a violation of the Amendment. And the Fourteenth Amendment applies with equal force to all State acts and powers; it must be deemed applicable when the State action consists of extradition, just as it is in the case of any other State action.

That the power to extradite is limited by the Fourteenth Amendment is the only conclusion possible in the light of the cases dealing with the full faith and credit clause section of the Constitution. Although that section, which is highly analogous to the extradition section, unequivocally commands the States to give full faith and credit to judgments rendered in other States, the power and

[17]In *Johnson v. Mathews,* 182 F. 2d 677 (1950).

authority to enforce such a judgment is limited by the Fourteenth Amendment. (See fuller discussion, Point B, *supra.*) For it is fundamental in the structure of the Constitution that none of its provisions grant the power to act in violation of the guarantees embodied in the Amendments. Thus, the Supreme Court has repeatedly rejected the argument that even the war power, despite its special nature and the emergencies that evoke its exercise, is removed from the impact of the due process clause.[18]

In extradition the State exercises its inherent police power with authorization, necessitated by the Constitutional prohibition of interstate compacts without Congressional consent,[19] derived either from Article IV or Federal statute (see note 4, *supra*). Viewing extradition from either aspect, there is no basis for concluding that this power, alone among the powers of government, may be exercised free from the Constitutional prohibitions.

The only answer to this position which has been suggested is that of the Court of Appeals for the District of Columbia, that extradition is merely "procedural," and that for this reason custody for extradition purposes could not be deemed to conflict with the Fourteenth Amendment. But whether or not the use of the coercive powers of the State of California violates the Constitution cannot be determined by labeling its act procedural; thus, in *Shelley v. Kraemer,* 334 U. S. 1, the Supreme Court had no doubt that the State violated the Fourteenth Amendment though its act consisted merely in the issuance of an injunction.

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[18]See *Hirabdyashi v. United States,* 320 U. S. 81, 100; *Ex parte Milligan,* 4 Wall. 2, 21; *Hamilton v. Kentucky Distilleries Co.,* 251 U. S. 146, 156; *Howe Building & Loan Association v. Blaisdell,* 290 U. S. 398, 426; *United States v. Cohen Grocery Co.,* 255 U. S. 81.

[19]Constitution, Art. I, sec. 10, par. 3.

Accordingly, the limitations of the Fourteenth Amendment apply to California's exercise of its power to extradite, and insofar as the constitutionality under the Fourteenth Amendment of Middlebrooks' extradition depends upon the constitutionality thereunder of his conviction and sentence, it was incumbent upon the District Court to determine the latter question.

Even assuming arguendo, contrary to our argument in Point A, that the language of the Supreme Court extradition opinions does not indicate that the constitutionality of the basis for the demand is to be considered by the courts of the asylum state, we submit that this failure must be attributed to the fact that in those cases the question was not presented nor envisaged of an extradition violating the Constitutional guarantees by reason of the unconstitutionality of the basis for the demand. When an inquiry into the basis and result of the extradition is necessary, as in the instant case, in order to determine whether the custody in the asylum state violates the Fourteenth Amendment, such an inquiry must be held proper and necessary.

E. The Weight of Opinion Among the Circuit Courts Is in Accord With the District Court's Decision.

The only Circuit Court which has been directly presented with the instant issue is the Court of Appeals for the Third Circuit; its position, stated in *Johnson v. Dye*, 175 F. 2d 250 (1949), is in accord with that of the District Court herein. In the *Dye* case, as here, the fugitive sought release on a writ of habeas corpus on the basis that his custody for extradition was unconstitutional because of the unconstitutionality of his Georgia conviction, which was the basis of the extradition demand, and because of the

cruel and unusual punishment to which he had been subjected in Georgia in serving his sentence. The Court found it unnecessary to consider the unconstitutionality of the conviction, holding that his punishment had been cruel and unusual and thus constituted a violation of the Fourteenth Amendment, and that his custody for extradition was therefore invalid. One judge, Judge O'Connell, dissented in part, believing that the Court should determine whether the fugitive would undergo cruel and unusual punishment if extradited, rather than whether he had in the past; "the logic of invoking the judicial power to eliminate a threatened invasion of a basic constitutional right seems to me irresistible" (175 F. 2d at p. 259). Judge O'Connell thus agreed with his brethren on the basic point that the courts in the place of asylum must consider the constitutionality of some aspects the conduct of the demanding state insofar as it affects the constitutionality of the extradition; and as we shall show below, Middlebrooks' release should be ordered whether the standard of the majority or of Judge O'Connell—the retrospective or prospective—is adopted.

The authority of the *Dye* decision on the points here in issue is not diminished by its reversal in a *per curiam* opinion by the Supreme Court, since that reversal solely related to the Third Circuit's holding as to the exhaustion of State remedies. The fugitive in that case had petitioned for habeas corpus in the Pennsylvania State Courts, but had not appealed beyond the intermediate State court. The Third Circuit held that this clear failure to exhaust State remedies was not significant, on the basis that the doctrine of exhaustion of State remedies did not apply in extradition cases. In reversing the Circuit Court, the Supreme Court relied expressly on its opinion in

Ex parte Hawk, 321 U. S. 114, which concerned the general necessity for exhaustion of State remedies; and it is clear that the Supreme Court did not reach the merits of the case. In *Jackson v. Ruthazer,* 181 F. 2d 588 (1950), the Second Circuit stated that it interpreted the *Dye* reversal as meaning that the fugitive should have exhausted his remedies in the Pennsylvania State Courts,[20] and further stated:

> "For the purpose of this decision we may assume that Johnson v. Dye except for the exhaustion of remedies point was correctly decided." (181 F. 2d at p. 589.)[21]

The opinion of the Court of Appeals for the District of Columbia in *Johnson v. Matthews,* 182 F. 2d 677 (1950), differs in tenor from the *Dye* and *Ruthazer* opinions. It is, however, less persuasive than the latter two opinions for the purpose of the instant case, since it involved extra-

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[20]And see, for this interpretation, *Horowitz and Steinberg,* The Fourteenth Amendment—Its Newly Recognized Impact, 23 So. Calif. Law Review (1950), 441, 442-3; note, Case of Fugitive From the Chain Gang, 2 (1949), Stanford Law Rev. 174, 183; discussion by District Court, R. 64-5. The view of the Court of Appeals for the District of Columbia (expressed in *Johnson v. Matthews,* 182 F. 2d 677) at note 22 (1950), that the Supreme Court meant by its reversal of the *Dye* case that the fugitive should address his contentions as to the unconstitutionality of the demanding State's conduct only to the courts of that State attributes to the Supreme Court a highly illogical basis of decision; as indicated *supra,* note 16, the question presented by the petition for habeas corpus in the asylum state is the constitutionality of the custody therein, which can only be determined by the courts in the place of asylum. There is no remedy for this custody in the demanding State, and there is not any true *procedural* question of exhaustion of remedies as between the courts of the asylum and demanding states. See dissenting opinion of Judge Bazelon in *Johnson v. Matthews.*

[21]The Court then determined that the state courts had rendered a full adjudication on the merits on the fugitive's contention that he had been subject to cruel and unusual punishment and that the federal courts need not re-examine this question.

dition for the purposes of trial, which as pointed out above, is directly controlled by the Constitutional provision on extradition and involves additional differing factors from the instant situation of extradition after conviction as well. A majority of two judges, one judge dissenting, held that the courts in the place of asylum should not consider the fugitive's allegations that he had been held without trial and in violation of due process by the demanding state prior to his escape. This holding was based largely on the Court's view of the Supreme Court decisions, which was similar to that adopted by appellants herein, and ignored the aspects of those opinions we have already discussed. Further, stating that the petition for habeas corpus in the asylum state only tested the validity of the detention therein, and that it did not "test the validity of the original or contemplated incarceration in the demanding state," the Court overlooked the fact that the latter question may determine the former.[22] The dissenting judge agreed with the view of Judge O'Connell in the *Dye* case and believed the case should be remanded for a determination of whether the fugitive had "suffered the alleged infringements and 'would be reasonably likely to undergo similar abuse if he were returned to Georgia.'"

We believe the majority in *Matthews* took a rigid view of extradition that was not justified by the Supreme Court decisions, and then exaggerated the possible evil consequences of a departure from this view.

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[22]The Court's discussion of the availability of relief in Georgia ignores the realistic situation pointed out by the District Court in the instant case and in our argument *supra*, as to the fugitive's opportunity to avail himself of the remedies in the demanding State. And its explanation that the extradition provision of the Constitution is merely "procedural," does not answer the argument that the use of the *procedure* may cause a State to violate other provisions of the Constitution.

VI.

California's Custody of Middlebrooks for Extradition Was Unconstitutional Because His Conviction and Sentence, Upon Which the Extradition Demand Was Based and Which It Was to Enforce, Violated the Due Process Guarantee of the Fourteenth Amendment.

We have established in Point II that the Constitution does not permit of an exception to the limitations imposed on California by the Fourteenth Amendment when it exercises its power to extradite, nor, by the same token, does the Constitution permit the Court to refuse to inquire into the basis and result of the extradition demand insofar as these questions determine whether the extradition violates the Fourteenth Amendment. We therefore will now demonstrate the correctness of the District Court's determinations that Georgia's conviction and sentence of Middlebrooks was unconstitutional and that California's custody of Middlebrooks for extradition was therefore likewise unconstitutional.

A. Middlebrooks Was Convicted Without the Due Process of Law Guaranteed by the Fourteenth Amendment.

Even accepting the statements on Middlebrooks' Georgia indictment at their face value, and ignoring his testimony as to the details of his conviction and the District Court's findings thereon, it is clear that he was convicted without due process of law.

According to the indictment, Middlebrooks not only "waived being formally arraigned" but also "waived" a copy of the bill of indictment and list of the witnesses before the grand jury [R. 27]. The indictment itself thus shows the truth of the District Court's findings that

Middlebrooks was neither arraigned, given a copy of the charges, nor informed of the allegations against him; the fact that the indictment attributes the failure to afford him these protections to a "waiver," rather than to their complete disregard by the convicting court, as the District Court found [R. 83-84, 54-55], is immaterial, for under the Fourteenth Amendment Middlebrooks' "waiver" would in any event have been nugatory (see below, p. 45). The indictment itself also evidences a failure to observe even a modicum of procedural safeguards in making the notations as to the "waivers," for the waiver of arraignment is signed only by the State's Solicitor General, and the waiver of the copy of the indictment and list of witnesses is wholly unsigned [R. 27, 50]. Again, it seems apparent from the papers that any opportunity given to Middlebrooks to plead was merely a gesture, with his conviction foreordained; for a plea of guilty is noted as the basis for his sentence [R. 28-39] although the indictment states that he plead not guilty [R. 27]. And no trial could have been held that would have been more than nominal since Middlebrooks had "waived" all the rights essential to preparation for trial. Finally, the indictment itself shows that no counsel was afforded Middlebrooks; and with respect to the right to counsel not even a "waiver" is noted [R. 27, 50].

On these facts, the violations of due process are flagrant. The defendant's right to be fully informed of the charges against him is a fundamental of due process; as the Supreme Court said with regard to proceedings similar to those in the instant case:

> "He (the defendant) had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement

of due process." (*Smith v. O'Grady,* 312 U. S. 332, 334.)[23]

And the State could not relieve itself by Middlebrooks' alleged waiver of the duty of giving him such real notice of the charge, by dispensing both with arraignment and a copy of the indictment. For a waiver of such rights by an uneducated boy of 17, acting without the advice of counsel or of any experienced person, could not possible be deemed an "intentional relinquishment or abandonment of a known right or privilege" with a full understanding of its value; and it is only in the event of such an informed waiver that the State's duty to accord procedural rights is discharged.[24] Indeed, it is hard to conceive of any circumstances under which a waiver such as Middlebrooks allegedly made would be valid; for the fact of such a waiver would almost of itself show either that there was a failure to understand the importance of the rights or that the defendant's judgment was overborne by external pressures. Further, even if the rights were of less significance than those Middlebrooks allegedly waived, it would be a violation of due process for the State to take advantage of a waiver by a person of Middlebrooks' ignorance, in order to deny him procedures generally accorded to defendants.

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[23]"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts." (*Cole and Jones v. Arkansas,* 338 U. S. 345; see similar emphasis on these rights in *In re Oliver,* 333 U. S. 257.)

[24]As to the requirements of understanding and deliberation to validate a waiver of the right to counsel, see *Glasser v. United States,* 315 U. S. 60, 71; *Adams v. U. S. ex rel McCann,* 317 U. S. 269; *von Moltke v. Gillies,* 332 U. S. 708, 723; *Johnson v. Zerbst,* 304 U. S. 458, 464.

The failure to afford counsel to Middlebrooks was, under the circumstance of his case, also a violation of due process. And while the District Court's finding that Middlebrooks requested counsel and his request was ignored [R. 83] underlines the unfairness of the proceeding, the failure to afford counsel was a denial of due process whether or not counsel was requested.[25]

As the Supreme Court summarized its position in *Uveges v. Pennsylvania,* 335 U. S. 437, 440, quoted by the District Court [R. 59], while all members of the Court do not agree that due process requires the State to protect the accused by offering counsel in the case of every serious crime, at the least there is unanimity that the State must offer "counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials." Middlebrooks, the defendant here, was young and unschooled [R. 83]; nothing in his background equipped him to deal single-handed with the criminal proceedings against him [R. 124-128]. He was charged with a felony which carried a maximum penalty of twenty years and entailed punishment by assignment to the chain gang; and he was in fact assigned to the chain gang for five years [R. 83, 84]. Even if it were assumed that he had an opportunity to determine whether to plead guilty, and that he in fact did so, the question of whether or not to make this choice is one on which such an untutored defendant needs assistance.[26] Middlebrooks' need for

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[25]*Tomkins v. Missouri,* 323 U. S. 485; *Rice v. Olson,* 324 U. S. 786; *Canizio v. New York,* 327 U. S. 82, 85; *Gibbs v. Burke,* 337 U. S. 773.

[26]*Townsend v. Burke,* 334 U. S. 736; *De Meerleer v. Michigan,* 329 U. S. 663; *Williams v. Kaiser,* 321 U. S. 471, 475.

counsel in order to assure that he did not plead guilty inadvisedly and to enable him to make a fair presentation of whatever defense he had against the charges, was greatly accentuated by the judge's disregard of his rights and failure to protect him from the disadvantages of his lack of representation.[27] Here all the circumstances stressed by the Supreme Court as showing a need for counsel were present: Middlebrooks' youth and inexperience "in the intricacies of criminal procedure"[28] and the failure of the judge to make any effort to protect his rights. And the form of Middlebrooks' alleged waivers alone are sufficient to show his prejudice from the lack of counsel. It is clear that counsel was essential for Middlebrooks' "adequate defense"; that the judgment against him cannot be regarded, because of the absence of counsel, as a true reflection of the facts of his case; and that the failure to afford counsel was a deprivation of due process of law, invalidating the conviction.

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The details of the conviction process, as found by the District Court, completes the picture of a total disregard of Middlebrooks' rights which is apparent from the notations on the indictment. After being held in jail for several months after the indictment Middlebrooks was told by his jailer to get ready for trial in fifteen minutes [R.

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[27]The Supreme Court has repeatedly stressed this factor as a determinant of the need for counsel. See the quotations in the District Court's opinion from *Uveges v. Pennsylvania*, 335 U. S. 437, 440; *Gibbs v. Burke*, 337 U. S. 773, 781 [R. 60]; *Townsend v. Burke*, 334 U. S. 736.

[28]*Uveges v. Pennsylvania, supra; Powell v. Alabama*, 287 U. S. 45, 69, 71; *Haley v. Ohio*, 332 U. S. 596; *Marino v. Ragen*, 327 U. S. 791. Compare *Marino v. Ragen* as to an unsigned waiver; compare also *Townsend v. Burke*, 334 U. S. 736; *Haley v. Ohio, supra.*

49, 83]. Without being informed of the charges against him [R. 49, 83], he was brought to the courtroom. No formal proceedings were held, the Judge merely saying to him, "Don't you know you can't go around breaking the laws of Georgia?" Though Middlebrooks denied he'd broken any laws and said he wanted a lawyer, the Judge forthwith, and without further inquiry, sentenced him to five years in jail. In view of the District Judge's opportunity to hear and observe Middlebrooks, his express finding as to the latter's credibility [R. 55], and the consistency of these findings with the notations on the indictment, they must be accepted as correct. They establish a flagrant and undeniable contravention of due process in Middlebrooks' conviction.

B. Appellee's Sentence Constituted a Violation of Due Process of Law Guaranteed by the Fourteenth Amendment in That It Imposed Cruel and Unusual Punishment Upon Him.

The District Court concluded, with ample basis, that Middlebrooks, who was assigned to a chain gang for service of his sentence, was forced to serve his sentence "under brutal and inhuman conditions" [R. 84]. It can hardly be doubted that the conditions which the District Court found to exist reflected a "systematic, deliberate and methodical employment of aggravated brutality" [R. 86], in the routine use of shackles, filthy and unsanitary living conditions, and the use as punishment of sweat boxes and stocks, which can only be defined as methods of torture [R. 50-52, 84-85, 140-159, 166, 172-189]. These conditions on the chain gang "were at all times herein material, and are, open, notorious and of long standing" [R. 85-86]; Middlebrooks' treatment was in no sense unusual or the result of any temporary or unusual circumstances. Rather,

assignment to the chain gang and the concomitant conditions of deliberate degradation and cruelty "was an integral part of the penal system of the State of Georgia at the time that petitioner was sentenced" and "was an inseparable part of the sentence imposed upon" Middlebrooks [R. 86].

A method of punishment showing such systematic brutality as that here existing falls below generally accepted standards of humanitarian treatment; thus, it constitutes "cruel and unusual punishment" in the sense of the prohibition of the Eighth Amendment to the Constitution, which obviously incorporates a humanitarian standard. And the District Court's reasoning that the due process clause of the Fourteenth Amendment prohibits the State from imposing cruel and unusual punishment in the treatment of prisoners is, we submit, irrefutable. That freedom from cruelty and degradation, pursued wantonly as an end in itself, is one of the "fundamental principles of liberty and justice" guaranteed by the Fourteenth Amendment[29] seems clear; that guarantee includes those aspects of the first Ten Amendments basic to liberty. While, as the District Court pointed out, the Supreme Court has not definitively passed on the question of whether this freedom is guaranteed against State action, in its only directly pertinent decision: *Francis v. Resweber*,[30] *all* the Justices indicated that cruel and unusual punishment is prohibited by due process. The majority differed from the minority in that they did not regard the method of execution there in issue as a cruel and unusual punishment; however, the majority assumed the premise expressed in the dissent that if this method was cruel and unusual it would be prohibited by

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[29]*Palko v. Connecticut*, 302 U. S. 319, 328.

[30]329 U. S. 459.

the Fourteenth Amendment (see quotation from majority opinion in opinion of District Court [R. 64]). And the Third Circuit's square holding that the due process clause prohibited cruel and unusual punishment was left unaffected by the Supreme Court's reversal of the opinion on the grounds of the failure to exhaust State remedies.[31]

Since the cruelties and tortures of the chain gang system were an "integral part of the chain gang systems [R. 86], which was of general application to persons confined upon conviction of felony" [R. 85-86], it was an inseparable part of the sentence of felony imposed upon Middlebrooks; his sentence therefore violated due process of law and must be regarded as void.[32] Furthermore, the District Court concluded, and there is no evidence or contention to the contrary, that the cruel and inhuman conditions to which Middlebrooks was subjected continue to be an integral part of the chain gang system and that Middlebrooks would necessarily again be subjected to them if returned to Georgia [R. 86, 90].

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[31]In *Johnson v. Dye*, 175 F. 2d 250 (1949), reversed *per curiam* on the basis of *Ex parte Hawk*, see discussion *supra*, p. 41. The comments on the Third Circuit's decision have approved its conclusion that the due process clause prohibited cruel and unusual punishment. See note, Case of Fugitive From a Chain Gang, 2 (1949) Stanford Law Rev. 174, 183; Horowitz and Steinberg, The Fourteenth Amendment, 23 So. Calif. Law Rev. 442, 451 (1950).

[32]See *Weems v. United States*, 217 U. S. 349, in which the Supreme Court held that a sentence imposed cruel and unusual punishment within the meaning of a provision of the *Philippine* Bill of Rights identical to the Eighth Amendment. Since any sentence which could be imposed would under the applicable statute include that punishment, the sentence was held void and the prisoner ordered released.

C. In View of the Unconstitutionality of Appellee's Conviction and Sentence, the District Court Was Correct in Ordering California to Release Appellee From Custody on the Grounds That Such Custody Violated the Constitution.

California's custody of Middlebrooks is not only based upon conviction and sentence which we have shown to be unconstitutional, but such custody is for the purpose of subjecting him to further unconstitutional confinement; from either standpoint, California's custody is a violation of the Constitution.

The underlying basis of California's custody is an unconstitutional conviction, which is, in law, a nullity; thus, California's custody has no constitutional or valid basis. See *Smith v. O'Grady,* 312 U. S. 332, 334; *Johnson v. Zerbst,* 304 U. S. 458 at p. 468; *Norton v. Shelby County,* 118 U. S. 425, 442; *Smith v. Cahoon,* 283 U. S. 553, 562.

> "Moreover, due process requires that no other jurisdiction shall give effect . . . to a judgement elsewhere acquired without due process." (*Griffin v. Griffin,* 327 U. S. 220, 229.)

And from the standpoint of the purpose and prospective effect of California's custody of Middlebrooks, it cannot be disputed, as the District Court determined, that Middlebrooks' unconstitutional confinement would be resumed if California were permitted to continue him in custody and to extradite him [R. 86, Finding 8; 91, Conclusion 11]; such resumption is, of course, the purpose of the extradition, as stated explicitly in the extradition request [R. 19; see District Court's opinion, R. 68, note 9]. Without in any way impugning the judicial processes of Georgia, it is clear (see discussion, *supra,* note 8) that there is no likelihood of Middlebrooks ever securing release from his

unconstitutional confinement if he were extradited to Georgia. But even disregarding the reality that if Middlebrooks were returned he would be confined for the duration of his sentence plus any penalty imposed for escape, it is indubitable that his confinement in Georgia would be reimposed for a substantial period of time.

Thus, the purpose of California's custody is to effectuate and enforce an unconstitutional conviction and sentence, and it is as much invalidated by this purpose as was and would be Georgia's custody of Middlebrooks for this purpose. From the standpoint of Georgia's reinstitution of Middlebrooks' unconstitutional confinement, California's aid is a *sine qua non* for Georgia's prospective unconstitutional act; and a State's use of its coercive power to enable another party to perform an unconstitutional act or its use to implement and enforce such an act, is itself a violation of the Constitution. While this constitutional issue has not heretofore been presented in the situation of a State rendering assistance to another State, because of the rarity of such assistance apart from extradition, the principle is clearly demonstrated by those cases in which a State has lent its power for the enforcement of orders, restrictions, or penalties other than those the State has itself established or adopted such an order as the basis for State action. Thus, in *Shelley v. Kramer*, 334 U. S. 1, where the question was the constitutionality of the State's enforcement by injunction of a restriction on land ownership established by private contract, the Court rejected the contention that "the participation of the State is so attenuated in character as not to amount to State action within the meaning of the Fourteenth Amendment," on the basis that the State "had made available . . . the full coercive power of government" to enforce the restriction established

by the contract (334 U. S. at pp. 13, 19). The State acted unconstitutionally, though it did no more than give the remedy of injunction, because this action was based upon the discriminatory restriction, and made possible its enforcement through contempt proceedings.[33]

By the same token, California acted unconstitutionally in using its extradition procedure, to enforce, and enable the further enforcement, of Middlebrooks' unconstitutional conviction and sentence.

Under well-established principles, California, through its Governor who issued the extradition warrant and the appellant who took appellee into custody, interpreted and applied California's extradition statute in an unconstitutional manner, in that his extradition was based upon and would enforce an unconstitutional and void conviction and sentence. Thus, Middlebrooks' custody by California was in violation of the Constitution, and it was necessary for the District Court, under its power to grant the writ of habeas corpus (28 U. S. C., Sec. 2241), to order appellee's release.

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[33]Similarly, the State was held to act unconstitutionally in adopting and enforcing restraints and orders it had not itself established or initiated, in *Marsh v. Alabama,* 326 U. S. 501 (enforcement by arrest, of private no trespassing order which infringed freedom of speech and religion); *Eubank v. City of Richmond,* 226 U. S. 137; *Washington v. Roberge,* 278 U. S. 116; *Harmon v. Tyler,* 273 U. S. 668 (attacking penal sanction to property holders' unreasonable zoning restrictions); *Nixon v. Condon,* 286 U. S. 73; *Smith v. Allwright,* 321 U. S. 649 (State enforcement of organization's determinations of voting qualifications).

Conclusion.

It is respectfully submitted that the District Court's judgment should be affirmed.

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